IN THE COURT OF APPEAL

AT NAKURU

(CORAM: GITHINJI, MWILU & GATEMBU, JJ.A)

CIVIL APPEAL NO. 75 OF 2008

BETWEEN

JASWANTKUMARBA BENESINGH JETHWA..........................APPELLANT

AND

POSTAL CORPORATION OF KENYA.……..........................…RESPONDENT

(Being an appeal from the whole Judgment of the High Court of Kenya at Nakuru (M. Koome, J.) delivered on 8th February, 2008

in

H.C.C.C. No. 168 of 2003 (O.S)

****

JUDGMENT OF THE COURT

This appeal is against the Judgment and decree of the High Court at Nakuru which declared the respondent in the appeal as entitled by adverse possession, to Land Reference No. Nakuru Municipality Block 5/4 (**suit land**) comprising of 0.0464 hectares. The appeal is also against the consequential orders that the respondent be registered as a proprietor thereof and that the respondent do execute the transfer in favour of the respondent.

By an originating summons (**OS**) brought under **sections 7, 17, 37 and 38(1)** of the **Limitations of Actions Act** Cap 22 of the Laws of Kenya (**LA Act**) and

Order XXXVI Rule 3D of **Civil Procedure Rules**, the respondent sought a declaration that it was entitled by adverse possession to the suit land, a declaration that the appellant's title had been extinguished and orders that the respondent be forthwith registered as proprietor; and that the appellant do execute a transfer and necessary acts to convey the suit land to the respondent.

The OS was supported by the affidavit of **Edgar Imbamba**, the Acting Corporation Secretary of the

respondent in which he stated the following facts, amongst others:

The respondent, Postal Corporation of Kenya (PCK) is a successor to East African Posts and Telecommunications Corporation (EAP&TC) and the Kenya Posts and Telecommunications (KP&TC). The appellant is the administratrix of the estate of the Late Banesingh Vajesingh Jethwa, the registered proprietor of the suit land who died on 5th December 1988, by virtue of a Grant of Letters of Administration Intestate issued in High Court Nakuru, Succession Cause No. 66 of 2000. PCK by itself and its predecessors has been in continuous, uninterrupted, notorious, and exclusive occupation of the suit land for a period of 26 years since 1974 and has been paying rates to Municipal Council of Nakuru; PCK has constructed on the suit land its Nakuru General Post Office. The appellant has been aware of such occupation and has not taken any action within the 12 years of the respondent's occupation and use of the property.

The appellant filed a replying affidavit stating, *inter alia,* that her husband was registered as proprietor of the suit land under the Registered Land Act on 13th April 1984 and had been in possession until his death; that the deceased had charged the land to Barclays Bank of Kenya Limited and the suit land was not free for alienation; that PCK has never been in possession of the suit land and if it took possession and developed the property such possession and development was secretive ; that the suit land comprised of the estate of the deceased and PCK had by a letter (dated 21st April 1999) acknowledged the deceased's title and offered to buy the suit land.

Sometimes in September 2005, Edgar Imbamba filed a further affidavit with leave of the court, to which some correspondence was annexed. The correspondence indicate, in essence that, the deceased sold the suit property to the predecessor of PCK sometime in 1972 and that the purchaser was to be registered as proprietor with effect from 1st January, 1974.

The correspondence also show that although the firm of Creswell Mann & Dod advocates, which acted for the deceased in the sale transaction, by a letter dated 4th April acknowledged receipt of balance of purchase price, and that the purchaser was entitled to the use of premises, the conveyance was not registered for various reasons and the deceased retained the certificate of lease. The affidavit further stated that the appellant in the Certificate of the Confirmation of a Grant of Letters of Administration issued on 9th March 2001 excluded the suit property from the estate of the deceased.

The record of appeal and the proceedings show that the appellant filed an application dated 18th January 2006 seeking direction that the OS be heard by way of *viva voce* evidence but on 9th February, 2008 the respective counsel for the parties agreed that the OS be heard by way of submissions and the court thereupon directed that the OS be determined by way of affidavits and submissions. Thereafter the OS proceeded by way of oral submissions.

Mr. Oriema who appeared at the trial for the respondent based his submissions on the facts contained in the two affidavits and reiterated that the respondent's claim was not based on the sale transaction. On the other hand, **Mr. Akango** who appeared for the appellant submitted, among other things, that a person who enters land by consent cannot claim adverse possession; that where a party entered into possession as a purchaser he can only claim adverse possession if the agreement has been rescinded or where a contract has been determined; that the deceased could not have entered into a contract of sale several years before the title was issued; that the fact that the deceased charged the property to Barclays Bank in 1983 showed that there was no sale agreement; that the respondent was a tenant at will, a mere licensee and that the OS should have been heard by *viva voce* evidence as there were contested issues.

The trial Judge made a finding of fact that the respondent has been in possession of the suit premises from 1974, that the contention by the appellant that the deceased's husband was always in possession was not true and that the fact that the respondent has constructed the Nakuru General Post Office in the premises had not been controverted. In addition, the learned Judge made a finding that the suit property was properly defined in the OS and rejected the submission that the OS should have been tried by oral evidence. The trial Judge ultimately concluded that the respondent had proved its case of adverse

possession of the suit premises to the required standard.

The 10 grounds of appeal can be compressed into two main grounds, as the appellant's counsel has indeed done in the written submissions, firstly that, the learned Judge erred in law in determining the OS summarily without oral evidence, and secondly, that the learned Judge erred in fact and in law in finding that the respondent had proved a claim to land by adverse possession.

The respondent has filed notice of grounds for affirming the decision. By **Rule 95(1)** of the **Court of Appeal Rules 2010,** a notice of affirming the decision can only be filed if the respondent intends to contend that the decision of the High Court should be "*affirmed on grounds other than those relied by the court*". The notice of grounds of affirming the decision is not valid as it does not contain any such ground or grounds. It merely responds to the appellant's grounds in the memorandum of appeal. Thus it is not necessary to consider the notice.

The appeal has been heard by way of written and oral submissions. On the question of procedural error, **Mr. Aim Yoni** learned counsel for the appellant submitted that the issues of facts and law raised by both parties in their various affidavits were of a complex nature involving ownership of land, registration of title and succession which necessitated calling of witness to clarify them. He contended that the directions were taken before the appellant filed the replying affidavit and also before the respondent filed a further affidavit, and that it is only after those affidavits were filed that it became obvious that OS was not the right procedure. He further contended that when it became obvious that the issues were of a complex nature, the Judge should have converted OS into a plaint or dismissed the OS and leave the respondent to pursue his claim by ordinary suit.

On the other hand, **Mr. Ogembo** learned counsel for the respondent, submitted that by **Order XXXVI Rule 3D** of the old Civil Procedure Rules, a claim to land by adverse possession could only be brought by OS and there is no authority for conversion of the claim into a civil suit.

Firstly, it is not factually correct that the directions were given before the appellant had filed the replying affidavit and also before the respondent had filed the further replying affidavit. The appellant filed a replying affidavit on 22nd November, 2004 whereas the appellant filed the further replying affidavit on or about 9th

November, 2005. The appellant's application for direction is dated 18th January, 2006. The appellant's counsel agreed on 9th February 2006 that the OS be determined by affidavits and submission. As the learned Judge correctly observed, had the appellant's counsel wanted the OS to be tried by oral evidence, he could have indicated so when directions were taken.

Secondly, it was imperative by virtue of Rule 3D of Order XXXVI, now rule 7(1) of Order 37 of 2010 Rules, that an application for adverse possession should be made by an OS. That rule specifically provides:

> ***"An application under section 38 of the Limitation of Actions Act shall be made by originating summons."***

However, Order XXXVI Rule 10 (1) now Order 37 Rule 19(1) of 2010 - rules provides:

> ***"Where, on an originating summons under this order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of those affidavits."***

Further subrule 10(3) now subrule (3) of rule 19 provided:

"This rule applies notwithstanding that the causes could not have been begun by filing a plaint."

The appellant's counsel relies on **Kibutiri v Kibutiri [1983] 1 KAR 60** for the proposition that the procedure by way of originating summons is intended for determination of simple matters and not complex questions of law and fact. He also

relied on **Kulsumbai v Abdul Hussein [1957]EA 699** and **Wakf Commissioners v Mwijabu [1984] 2 KAR 12** and contended that since the OS raises complex issues of fact and law, the court should have dismissed the summons and leave the respondent to pursue its claim by ordinary suit.

The respondent's counsel submitted that the authorities cited are distinguishable as they do not deal with application for adverse possession. He submitted that there exists no authority for a conversion of claim of adverse possession properly brought into an ordinary suit.

Where the rules stipulate that a claim has to be brought by originating summons, the court has no power to dismiss the claim so brought, merely because it emerges that the claim raises complex questions of fact and law. From the current state of the rules, the only power the court has is to order the proceeding to be continued as if they had been begun by filing of a plaint. Rule 36 of Order XXXVI, now rule 19 of Order 37, is a general and all-encompassing rule, which governs all originating summons including originating summons brought under section 38 of the Limitations of Actions Act. The rule was intended, among other things, to save the parties the expense of bringing a suit in the ordinary way.

The appellant's counsel acquiesced to the OS being determined on the basis of affidavits and submissions. His submission later, that oral evidence should have been taken without specifying the issues which required ascertainment by oral evidence or demonstrating that injustice was occasioned thereby, was an afterthought. The court was entitled to determine the dispute in accordance with the directions already given with consent of respective counsel. There is therefore no merit in the argument that the learned Judge erred in determining the OS without oral evidence.

Before we consider whether the court erred in allowing the claim to land by adverse possession, it is necessary to understand the nature of the land and the state of the register.

The suit land is a leasehold under the Registered Land Act (**RLA**) for a term of 99 years from 1st December 1924. The lessor is the Government of Kenya and the Lessee is Banesingh Vejesingh Jethwa. The register was opened on 28th October 1983 and the deceased was registered as proprietor on the same day. However the certificate of lease was issued on 13th April 1984. The copy of the register shows that on 28th October, 1983 a charge in favour of Barclays Bank of Kenya Limited for uncertain amount was registered. The decree of the High Court has been executed as the respondent was registered as proprietor and a Certificate of Lease given to the respondent on 28th June 2010.

The grounds of appeal state that the learned Judge erred in law in failing to consider the circumstances of the respondent's entry into the suit land and in failing to appreciate that the respondent entered in the land with the consent of the appellant through a sale agreement which had not been terminated. The appellant counsel submitted that the learned Judge relied on the element of discontinuance of possession and that the element of dispossession was not proved. He contended that the fact that deceased used the suit land as security for a loan proved that he had not been dispossessed and that the existence of sale agreement, rescission or termination of the sale agreement was not proved.

On the other hand the respondent's counsel relying mainly on **Hosea v. Njiru [1974] EA 526** submitted, in essence, that upon the payment of the purchase price, the occupation of the respondent was equivalent to dispossession and that the appellant never proved licence or tenancy.

It is not necessary to restate the law on adverse possession as it has been comprehensively stated before in many decisions, both of the High Court and of this Court, some which have been cited by the respective

counsel. (See, for example, **Hosea v. Njiru [1974] EA 526**, **Kairu v Gicheru [1988] 2 KAR 111**, **Wambugu v Njuguna [1983] KLR 172**, **Public Trustees v. Wanduru [1984] KLR 314**, **Githu v Ndeete 1984 KLR 776**, **Wanje v Saikwa (No. 2) [1984] KLR 284** and **Mungania v. Imanyara [1985] KLR 1.)**

The law is also stautory. By S. 7 of the LA Act, an action to recover land may not be brought after the end of 12 years from the date on which the right of action accrued. By S.17 of the same Act, at the expiry of the 12 years, the title of such person is extinguished. By S. 38, a person who claims to be entitled to land by adverse possession may apply to the High Court for an order for registration.

It is however necessary to distinguish between a purchaser in possession under an agreement of sale pending completion and a purchaser in possession, who has paid the whole of the purchase price, pending registration of transfer so far as it relates to when the time starts running for purposes of adverse possession. This distinction was clearly brought out in **Wambugu v Njuguna** (supra). There, it was held that where a claimant is in exclusive possession under a contract of sale pending completion, he is in possession with leave and licence of the vendor and possession can only be adverse once the contract is repudiated or rescinded (see also **Mungania v Imanyara** (supra).

It was further held that where a claimant is in exclusive possession under a contract of sale, the claimant's possession is deemed to have become adverse to that of the owner after payment of the last instalment of the purchase price. Where, however, the purchaser is put in possession after paying the full purchase price, his possession becomes adverse to that of the vendor when he took possession for that is the time when vendor's possession was discontinued (**Public Trustee v Wanduru,** (supra).

The respondent's evidence in the supporting affidavit that it has been in continuous, uninterrupted, notorious and exclusive possession since 1974 was supported by the further affidavit and the documents annexed thereto. The documents show *inter alia*, that sometime in 1973 the deceased sold the suit premises, then known as LR No. 451/25/VII (where, apparently there was an existing building leased to M/s Rift Valley Growers) to KP&TC. The letter dated 4th April 1974 from the deceased's advocates in the sale transaction confirmed that they had received the balance of the purchase price and that KP&TC was entitled to the rent of the premises from January 1974. The letter from KP&TC to the vendor's advocates indicates that there was delay in the registration of the transfer and the documents were being resubmitted for registration with effect from 1st January, 1974. However, the registration of the transfer was not done and the appellant's advocates were later, by a letter dated 22nd March 1993 to confirm that although the land was sold and the money did change hands, the appellant was still holding the original certificate of lease. Although the appellant deponed in the replying affidavit, amongst other things, that the deceased was in possession until his death and that the respondent was not in possession at any time, her advocate submitted at the trial that the respondent was a licensee.

In addition, the appellant's counsel submitted before us that *although there was continuous occupation of the suit land*, there lacked the element of dispossession. Thus the respondent's possession was admitted subsequent to the filing of the replying affidavit.

The appellant's counsel submitted in the High Court that there could not have been a sale in 1973 in view of the fact that the deceased was registered as a proprietor on 28th October, 1983.

By section 119 of the Evidence Act, the court may presume facts which are likely to have happened, regard being had to the common cause of natural events, human conduct and public and private business in relation to the facts of the case.

It can be inferred from the conduct of parties and documents that, either the land was not registered at the time of sale or that the land was registered under one of the land registration Acts mentioned in Section 2 of the RLA (now repealed and re-enacted as The Land Registration Act 2012 – Act No. 3 of 2012), and in 1983 title converted under section 12 of the repealed Act to one under the RLA.

The latter is the more likely to have happened because the appellant's advocate M/s Hamilton Harrison &

Mathews in the letter dated 22nd March 1983 referred, for the first time, to the current title as a "new Certificate of Lease". The registration or the change of registration did not stop the time from running (see **Kairu v Gacheru [1988] 2 KAR III.** On the contrary, section 30(f) of the RLA provided that the registration was subject to rights acquired or in the process of being acquired under the Limitation of Actions Act.

Moreover, the creation of a charge in favour of Barclays Bank of Kenya Limited is not an act of dispossession and by section 38(2) of the LA Act, the registration of a person entitled to land by adverse possession is subject to the entry on the register which has not been extinguished.

From the evidence it is indubitable that the respondent took possession of the suit land in 1974 as a purchaser after paying the whole of the purchase price. It has constructed or used the premises as General Post Office and continuously paid plot rates. The possession of the respondent was open, continuous, uninterrupted and notorious for more than 12 years and was adverse to that of the deceased from the time it took possession. The respondent's letter dated 21st April 1999 to the appellant intimating that the respondent would like to complete the long outstanding transfer does not amount to an act of dispossession or any acknowledgement that the deceased or the appellant had a proprietary interest in the suit land. Indeed, by excluding the suit property from the estate of the deceased in 2001 the appellant thereby acknowledged that the estate has no such proprietary interest.

The appellant's counsel raised a novel issue in his oral submissions that the respondent being a government as defined in section 2 of LA Act cannot acquire land by adverse possession. It was submitted that the government has a radical title. That point was not raised in the replying affidavit nor in the submissions in the High Court. It was not also made a ground of appeal or raised in the written submissions in this Court. The novel point took the respondent's counsel by surprise and he could only submit that the issue cannot belatedly be raised at this stage.

Although it may be permissible to raise a new point for the first time on appeal if the point relates to the jurisdiction of the Court (see **Kenya Commercial Bank Limited vs. Osebe [1982] 1 KAR 48)**, we decline to express a view on the matter as we have not heard the full arguments.

For the foregoing reasons, we are satisfied that the grounds of appeal have no merit and that the High Court made a correct determination of the dispute.

In the premises the appeal is dismissed with costs to the respondent.

Dated and delivered at Nakuru this 26th day of March, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR*.*